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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FAYELYNN SAMS, Individually, and on behalf of all others similarly situated. Plaintiffs, v. YAHOO! INC., Defendant.	Case No. 3:10-CV-05897-JF **AMENDED BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF DEFENDANT YAHOO! INC.'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)** Date: April 29, 2011 Time: 9:00 am Courtroom 3

STATEMENT OF INTEREST OF AMICUS CURIAE

The National District Attorney's Association is a non-profit professional organization whose membership is comprised of district attorneys, state's

attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations in every state and territory of the United States. The NDAA serves as a nationwide, interdisciplinary resource center for training, research, technical assistance, and publications reflecting the highest standards and cutting-edge practices of the prosecutorial profession. The NDAA believes that this brief will assist the Court in its consideration of the proper interpretation and application of the rules governing service of grand jury subpoenas in this case.

FACTS AND SUMMARY OF THE ARGUMENT

The NDAA relies on the facts as presented in Yahoo!'s Amended Motion to Dismiss.

Plaintiff's interpretation of the use of a subpoena *duces tecum* in an interstate criminal investigation and prosecution will have a wide ranging impact on law enforcement if adopted by the Court. Law enforcement across the nation have partnered with Internet Companies such as Yahoo!, Internet Service Providers, financial institutions, hospitals and other medical care facilities, and other entities keeping and maintaining records that may be required in a criminal investigation. These companies have partnered with law enforcement to provide for an efficient manner in which to process requests for information while complying with the provisions of the governing law. Requiring personal service of subpoenas *duces tecum* is unnecessary and would be unduly burdensome to law

enforcement and would be an impediment to the administration of sheriffs and prosecutors nationwide.

I. THE COURT SHOULD DISMISS THE AMENDED COMPLAINT BECAUSE PLAINTIFF LACKS STANDING TO CHALLENGE THE FORM OF SERVICE OF THE SUBPOENAS

Formal service requirements for subpoenas *duces tecum* serve a dual purpose. First, they put the recipient on notice of the records or information requested, and, perhaps more importantly, place the recipient on notice of the potential for sanctions for noncompliance. The court in *People v. Delaire*, 610 NE 2d. 1277, 1287 (Ill. App. 1993) rejected the Defendant's challenge of subpoenas directed to a telephone company on the basis of an insufficiency of service. In *DeLaire* the subpoenas were served by mail or facsimile on the telephone company by an unknown person and by the sheriff or coroner as required by Illinois statute. In rejecting the insufficiency of service argument the court reasoned that because the defendant could not be held in contempt for failure to comply with the subpoenas he lacked standing to challenge the manner of issuance of the subpoenas. *Id*. The court further reasoned that the right to insist on formal service lies solely with the recipient and not the subject of the subpoena. *Id* at 1288.

This concept was reiterated by the court in *Mehrer v. Diagnostic Imaging Center, P.C.*, 157 SW 3d 315, 321 FN1 (Mo. App. W.D. 2005). Mehrer attempted to subpoena counsel for Diagnostic Imaging by facsimile and regular mail.

Counsel for Diagnostic Imaging objected based on insufficient service and the subpoenas were quashed. However, the court noted that the recipient can waive the formal requirements and that only the recipient could object to the means of service. *Id.*

Finally, a similar attack on the formal service requirements was rejected in *Booker v. Dominion Virginia Power*, 2010 WL 1848474 (E.D. Va. May 7, 2010) on the basis of standing. As in *DeLaire* and *Mehrer*, Booker lacked standing to challenge the subpoenas procedurally because the right to accept service by a particular means was personal to Dominion Virginia Power. It logically follows that this is because Booker could not be subject to sanctions for noncompliance by the recipient of the subpoena.

In the case at bar Plaintiff merely challenges the service of the subpoena by facsimile and does not allege any other defects. As stated elsewhere in the pleadings Yahoo! has informed law enforcement agencies of its waiver of formal service requirements of subpoenas *duces tecum*. This is presumably done in conjunction with the large number of subpoena requests it receives and with its obligations under the Stored Communications Act. To take away the personal right of Yahoo! and other similarly situated entities to waive the formal service requirements would impermissibly infringe upon their right to determine how they accept and respond to properly issued subpoenas in accordance with their business

practices. To give a party who is not subject to sanctions for noncompliance with a subpoena the right to insist that the recipient demand compliance with the formal service requirements would improperly inject a third party into the subpoenaing party-recipient relationship of a criminal investigation.

II. THE COURT SHOULD DISMISS THE AMENDED COMPLAINT BECAUSE CHALLENGING THE FORM OF SERVICE OF THE SUBPOENAS IN A CIVIL ACTION IS AN IMPERMISSIBLE COLLATERAL ATTACK ON A CRIMINAL CONVICTION

A civil plaintiff is barred from "recover[ing] damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid". *Hall v. City of Philadelphia***,** 2010 WL 1996379 (E.D.Pa.,2010) (quoting *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)). While such a challenge is permissible when it will not invalidate the defendant's conviction, it is improper where the sufficiency of the evidence absent the alleged unconstitutional search and seizure is inadequate to preserve the conviction. *Hall*, 2010 WL 1996379, at *3 (citing *Nelson v. Campbell*, 541 U.S. 637, 647 (2004)).

Hall challenged his convictions under Racketeer Influenced and Corrupt Organizations Act (RICO) in a 42 U.S.C. §1983 action alleging a conspiracy among law enforcement to violate his Civil Rights. In granting the Defendant's Motion to Dismiss the court reasoned that because Hall could not have been convicted without the search and seizure of two kilograms of cocaine in his

possession, allowing him to recover damages as a result of police conduct would invalidate his conviction.

Similarly, the court dismissed Plaintiff's § 1983 claim in *Brown v. Town of DeKalb, Miss.*, 519 F.Supp.2d 635, S.D.Miss., (2007). Brown alleged that illegal search and seizure of his safety deposit box led to his confession where he admitted to embezzlement. *Id*. at 638. Brown later plead guilty while his motion to suppress the search and seizure of his safety deposit box was pending. The court held that without the search and seizure of his safety deposit box the State would have no evidence with which to convict him of embezzlement. *Id*.

Although Plaintiff Sams is not bringing a §1983 action against the State of Georgia but rather a civil action against Yahoo!, the *Heck* doctrine applies because in essence this court would have to find that Yahoo! improperly provided records to law enforcement. Such a finding would be tantamount to a finding that the State of Georgia unconstitutionally searched and seized Plaintiff's records. However, the burden is on the Plaintiff to demonstrate that the prior conviction has already been invalidated. *Heck*, 512 U.S. at 487. Plaintiff's Amended Complaint must be dismissed as an impermissible collateral attack because she is unable to do so.

III. THE COURT SHOULD DISMISS THE AMENDED COMPLAINT BECAUSE YAHOO!'S COMPLIANCE WITH THE SUBPOENAS WAS NOT VOLUNTARY

Plaintiff's use of the term voluntary under 18 U.S.C. §2702 to describe Yahoo!'s response to the subpoenas is inaccurate. She points to letters either accompanying or preceding the subpoenas and alleges that, in essence, Yahoo! was responding to a request for voluntary disclosure rather than the subpoenas themselves. An entity can produce records voluntarily by a request for such records. For purposes of this argument such a request will be termed informal. However, a subpoena is not an informal request but rather a court order to produce such records or challenge the jurisdiction or authority of the subpoenaing party. If such a challenger, if made, is unsuccessful, further non-compliance is punishable by contempt. F. R. Civ. P. 45(e); Cal. Civ. Proc. Code § 1991.

Plaintiff likens Yahoo!'s compliance with the subpoena to voluntary compliance in that they did not challenge the subpoena. However, "[v]oluntariness is not shown by mere acquiescence to authority." *U.S. v. Swanson*, 155 F.Supp.2d 992, 1001 (C.D. Ill. 2001) (citing *Bumper v. North Carolina*, 391 U.S 543 (1968)). Swanson challenged subpoenas for hair and saliva samples that he complied with which were served on him while he was in custody and had requested but was not yet represented by counsel. *Swanson*, 155 F. Supp.2d at 1001. In quashing the subpoenas the court reasoned that his compliance was not voluntary because the subpoenas implicated his 4th Amendment rights and that he was unaware of the process to challenge the subpoenas. *Id*. In granting Swanson's Motion to Suppress

the hair and saliva samples the court reasoned that he did not voluntarily comply with the subpoenas because had he not been in custody he would have been in a position to challenge the validity of the subpoenas, had he chosen to do so. *Id*. at 1002.

Yahoo! has legal counsel and presumably has consulted with them in determining how they will accept and respond to investigative subpoenas. The fact that they have communicated their policy to law enforcement corroborates this. Therefore, it can be said that Yahoo!'s compliance with the subpoenas was voluntary under the *Bumper* analysis in that it was aware of its ability to challenge their validity if they chose to do so. However, it does not fit the term voluntary in Plaintiff's analysis in that Yahoo! did not produce the records in response to an informal request but rather they complied with a valid subpoena, fully aware of their right to challenge it and the penalties for non-compliance. What Plaintiff seems to be requiring Yahoo! and other similarly situated entities to insist upon a court order enforcing an already valid court order. By retaining legal counsel Yahoo! can be presumed to know if and when circumstances exist under which they should challenge a subpoena, unlike Swanson.

Furthermore, courts have quashed subpoenas or held the fruits of the subpoenas inadmissible if it is found that compliance with the subpoena has been the result of coercion or was unreasonable or oppressive. *In Re Nwamu*, 421 F.

Supp. 1361, 1365-66 (S.D.N.Y. 1976). The existence of coercion or unreasonableness renders compliance not voluntary. However, where, as here, compliance despite the lack of coercion or unreasonableness does not equate to voluntary compliance. The court in *U.S. v. Barr*, 605 F. Supp. 114 (S.D.N.Y 1985) denied Defendant's Motion to Suppress material gained by subpoena because compliance by an agent he had authorized to accept service was deemed voluntary. Although Barr was incarcerated at the time the subpoenas were served and complied with because the agent had the opportunity to challenge the subpoenas but chose not to. *Id*. at 118-19.

The distinction Plaintiff attempts to draw between voluntary compliance within the terms of the Stored Communications Act and within its plain meaning and as defined by the above authority is misplaced. Plaintiff attempts to equate Yahoo!'s voluntary compliance with a valid court order with impermissible voluntary compliance of an informal request under the Stored Communications Act.

CONCLUSION

Subpoenas are an integral part of the investigative and prosecutorial process to detect and prosecute all crimes, particularity those against children. Quite often, as is the case here, the necessary information for those prosecutions rests with out

of state companies holding information not otherwise available to law enforcement. Yahoo! has adopted and communicated a policy regarding subpoena requests by law enforcement. Yahoo! and Yahoo! alone, as the recipient of these subpoenas, can determine how they will receive them and are obligated to respond to them according to the various applicable laws. Yahoo! is in a position to challenge the subpoenas if they deem it proper and a civil plaintiff cannot complain that Yahoo! has failed to do so to collaterally attack a criminal conviction.

Consequently, *amicus* NDAA urges the Court to grant Yahoo!'s Amended Motion to Dismiss.

DATED: February 15, 2011

By:_____

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Certificate of Compliance with Circuit Rule 32-1

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief uses 14-point Times New Roman spaced type; the text is double-spaced; and footnotes are single-spaced. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because there are no limits on the length of party briefs in support of motions to dismiss in criminal cases under Rule 12. This brief contains approximately 2,000 words.

DATED: February 15, 2011

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